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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

STEPHEN WHITEWAY, *et al.*,

No. C 05-2320 SBA

Plaintiffs,

ORDER

v.

[Docket No. 121]

FEDEx KINKOS OFFICE AND
PRINT SERVICES, *et al.*,

Defendants.

Before the Court is defendant FedEx Kinkos Office and Print Services, Inc.'s (FedEx) motion to compel the plaintiff to include a request for a notice of exclusion in the mailing of the class notice [Docket No. 121]. After reading and considering the arguments presented by the parties, the Court finds this matter appropriate for resolution without a hearing. *See* FED. R. CIV. P. 78. For the reasons stated below, the motion to compel is DENIED.

BACKGROUND

On September 13, 2006, the Court ordered class certification of "current and former FedEx Kinko's [Center Managers] who were classified as exempt employees at any time between April 18, 2002, and the present." Docket No. 89. On January 16, 2007, the parties stipulated to providing class certification notice to potential members of the class by first class mail. FedEx is now requesting that the plaintiff be compelled to include a one page request for exclusion in the class notice mailing to allow recipients a means of opting out of the class action if they so choose. FedEx has agreed to provide the exclusion form and a stamped self-addressed envelope at its expense. FedEx maintains that a request for exclusion will make the class notice clearer and more concise, and will eliminate any ambiguity as to when and how members may elect to be excluded.

The plaintiff opposes being required to include a "request for exclusion" form with the class notification. It is the plaintiff's position that there is no basis for requiring such an exclusion form with the class notice, that including it would cause confusion among class members, and it would increase

the administrative costs of the notice process.

LEGAL STANDARDS

Federal Rule of Civil Procedure 23(c)(2)(B) provides that

For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

ANALYSIS

FedEx acknowledges that “Federal Rule 23(b)(3) does not explicitly require a request for exclusion,” but argues that including makes the class notice clearer and more concise, and helps the notice to be the “best notice practicable under the circumstances.” Docket No. 143. FedEx points to no authority either requiring such an exclusion notice form, or any suggesting that it would make the notice the best practicable under the circumstances. Instead, FedEx relies upon what it refers to as the “customary and ordinary practice in class action litigation.” Counsel for FedEx declares that they are unaware of any case amongst the hundreds they have handled where a court has refused to allow the inclusion of a request for exclusion in any notice sent to class members. Countering this, the plaintiff has submitted a declaration from a class action administrator who states that “Class Notices in wage and hour class actions are not customarily sent along with a “Request for Exclusion” form.” Docket No. 134 (Hamann Decl.) (underscoring in original).

Whatever the purported “custom” may be, the posture of FedEx’s request is in the form a motion to compel seeking an order from the Court mandating that the plaintiff include an exclusion notice. It is upon FedEx to demonstrate that it is entitled to the relief that it is requesting. It has not done so.

